Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-714

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
PETITIONER,

v.

BLACKSTONE VALLEY ELECTRIC COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

BRIEF FOR RESPONDENT IN OPPOSITION

PETER J. MCGINN
TILLINGHAST, COLLINS & GRAHAM
One Old Stone Square
Providence, Rhode Island 02903
(401) 456-1200
Counsel of Record

ROBERT G. BLEAKNEY, JR.
SULLIVAN & WORCESTER
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2903
Attorneys for Respondent Blackstone Valley Electric Company

Blanchard Press, Inc., Boston, Mass. — Law Printers (617) 426-6690

I.

QUESTION PRESENTED FOR REVIEW

Was the Rhode Island Supreme Court correct in holding that the doctrine of preemption under federal law did not apply to the ultimate distribution of a refund by a retail electric utility where the refund had been received by the retail utility from its wholesale power supplier pursuant to a Federal Energy Regulatory Commission rate adjustment?

TABLE OF CONTENTS

	Page
Question Presented for Review	I
Table of Contents	III
Table of Authorities	IV
Opinions Below	1
Jurisdiction	1
Constitutional Provisions, Statutes and Regulations	2
Statement of the Case	2
Summary of Argument	3
Argument	4
While the Power To Set Rates for Interstate Sales of Electric Energy at Wholesale Is Vested Exclusively in the FERC, the States May Regulate the Sale of Such Energy at Local Retail Rates to Ultimate Customers. In the Instant Case, the FERC Had Exclusive Jurisdiction to Direct the Amount of the Refund to Blackstone, the Local Retail Electric Distributing Company, but the State of Rhode Island Properly Regulated the Disposition of That Refund by Blackstone to Its Retail Customers	4
(i) Factual Background	5
(ii) The Rhode Island Supreme Court's Reasoning	7
(iii) Response to Petitioner's Preemption Argument	9
(iv) Response to Petitioner's Offset Argument	11
(v) Massachusetts Treatment of the Refund	13
Conclusion	14
Supplemental Appendix	Supp. App. 1

TABLE OF AUTHORITIES

Federal

U.S. Supreme Court Decisions Page

Federal Power Commission v. *Southern California Edison Co.*, 376 U.S. 205, 11 L.Ed.2d 638 (1964) 4, 5, 13
Illinois Natural Gas Co. v. *Central Illinois Public Service Co.*, 314 U.S. 498, 86 L.Ed 371 (1942) 4
Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. __, 101 L.Ed.2d 322 (1988) 8, 10, 13
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953, 90 L.Ed.2d 943 (1986) 8, 9, 10

U.S. Court of Appeals Decisions

Belco Petroleum Corp. v. *FERC*, 589 F.2d 680 (D.C. Cir. 1978) 11
Boston Edison Co. v. *FERC*, 611 F.2d 8 (1st Cir. 1979) 10
Gillring Oil Co. v. *FERC*, 566 F.2d 1323 (5th Cir. 1978), *cert. denied*, 439 U.S. 823 11
Interstate Natural Gas Ass'n of America v. *FERC*, 756 F.2d 166 (D.C. Cir. 1985) 12
Natural Gas Pipeline of America v. *Federal Power Commission*, 134 F.2d 263 (7th Cir. 1942) 11
Public Service Co. of New Hampshire v. *FERC*, 600 F.2d 944 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 990 (1979) 10
United Gas Pipe Line Co. v. *FERC*, 657 F.2d 790 (5th Cir. 1981) 12

Statutes

Federal Power Act, 16 U.S.C. §791(a) *et seq.* 5
Natural Gas Act, 15 U.S.C. §717 *et seq.* 5

Federal Agency Decisions

Montaup Electric Company, 38 FERC (CCH) ¶61,252 ... 2, 12

State Court Decisions Page

Blackstone Valley Elec. Co. v. *PUC*, 543 A.2d 253 (R.I. 1988) 3
Eastern Edison Co. v. *Dept. of Public Utilities*, 388 Mass. 292, 446 N.E.2d 684 (1983) 5, 13
Narragansett Electric Company v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978) 7, 8, 9, 10, 13
Narragansett Electric Company v. *Harsch*, 117 R.I. 395, 368 A.2d 1194 (1977) 6
Okaloosa Asphalt Enterprises v. *Okaloosa County Gas District*, 524 So.2d 1095 (Fla. App. 1 Dist. 1988) 11
Roberts v. *Narragansett Electric Company*, 470 A.2d 215 (R.I. 1984) 7, 8

Statutes

R.I. Gen. Laws §39-5-1 (1956) 2, 3
R.I. Gen. Laws §39-1-11 (1956) 6

Others

In re Eastern Edison Co., D.P.U. 87-29/87-53 13
R.I.P.C.U. Tariff No. 709 ..... 2, 6, 7
R.I.P.C.U. Tariff No. 745 ..... 2, 6, 7

In the
Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-714

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

PETITIONER,

v.

BLACKSTONE VALLEY ELECTRIC COMPANY,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

Respondent agrees with Petitioner's identification of the opinions and judgments delivered by the Rhode Island Supreme Court and the Rhode Island Public Utilities Commission.

Jurisdiction

Respondent agrees that Petitioner has correctly identified the federal statutory basis for the relief he seeks.

Constitutional Provisions, Statutes and Regulations

Respondent agrees with Petitioner that his argument relies upon Article VI of the United States Constitution as set forth in the Petition. Regulations or tariffs having the force of regulations under consideration include R.I.P.U.C. Tariff No. 745 (Appendix 32-33) and R.I.P.U.C. Tariff No. 709 (App. 34-36).

Statement of the Case

On August 24, 1987, Blackstone Valley Electric Company ("Blackstone" or "Company")[1] filed with the Rhode Island Public Utilities Commission ("Commission") for approval of an interim adjustment to its purchased power cost adjustment ("PPCA") factor to reflect billing adjustments received from its power supplier, Montaup Electric Company ("Montaup"). *See*, Opinion No. 267, *Montaup Electric Company*, Docket Numbers ER 81-749-003 and ER 82-325-002 (Phase 1), reported at 38 FERC (CCH) ¶61,252. A principal issue before the Commission was Blackstone's proposed disposition of a refund that the Federal Energy Regulatory Commission ("FERC") had determined that Montaup owed to its wholesale customers, including Blackstone.

Following hearings, the Commission ordered that Blackstone return to its ratepayers that portion of the Montaup refund created by them, but to hold that portion of the refund contributed by Blackstone in an escrow fund for future disposition by the Commission (App. 10, 26). On January 21, 1988, Blackstone filed with the Rhode Island Supreme Court a statutory petition for certiorari under §39-5-1, *Rhode Island General Laws*, 1956, as amended.

---

[1] Blackstone is wholly owned by Eastern Utilities Associates, a Massachusetts trust whose stock is publicly traded. Its affiliates are Montaup Electric Company, Eastern Edison Company, EUA Service Corporation, EUA Cogenics Corporation, EUA Power Corporation and EUA Energy Investment Corporation.

In a decision and opinion dated June 27, 1988 and reported at 543 A.2d 253,[2] the Rhode Island Supreme Court, per Weisberger, J., sustained the Company's position and directed the Commission to permit payment of the refund to be made by Blackstone to its retail customers to the extent of their contributions in excess of the final rates and to Blackstone to the extent that it had underwritten payments to Montaup in excess of the FERC-approved rates. *Blackstone Valley Elec. Co. v. PUC*, 543 A.2d 253 (R.I. 1988).

The Attorney General then petitioned the Rhode Island Supreme Court for reargument, asserting that the doctrine of federal preemption required that all of the Montaup refund to Blackstone be paid by Blackstone to its retail customers. By an order dated July 25, 1988, the Court denied the petition for reargument and stated that the Attorney General's preemption argument "borders upon the frivolous, since the FERC merely ordered Montaup to refund excessive rates charged to its *wholesale* customers. There was nothing before the FERC which in any way dealt with the disposition of the refund by Blackstone, but only the question that a refund should be made to Blackstone by Montaup." (App. 7; emphasis in original).

By a petition for a writ of certiorari to this Court dated October 20, 1988, the Attorney General for the State of Rhode Island seeks review of the decision of the Rhode Island Supreme Court.

Summary of Argument

(i) The State of Rhode Island, and not the FERC, has jurisdiction to determine the ultimate disposition of a refund received by Blackstone, the retail electric distributing com-

[2] The syllabus of the case in the unofficial report contains the erroneous statement that "[t]he Superior Court, Providence County, Giannini, P.J., entered judgment and further review was sought" (App. 1; 543 A.2d 253). Under Rhode Island law § 39-5-1, *R.I.G.L.*, 1956, as amended, appeals from decisions of the Commission are by way of non-discretionary statutory writ of certiorari to the Rhode Island Supreme Court. The superior court is not involved in the statutory appeal process and was not involved in this case.

pany, from Montaup, its wholesale distributor, where that disposition merely represents a retail price adjustment between Blackstone and its customers.

(ii) The Rhode Island Supreme Court correctly concluded that the FERC's determination of the amount of a refund by an interstate wholesale supplier to its wholesale purchaser does not control the State's determination of the ultimate distribution of that refund by the purchaser.

(iii) The federal court cases cited by Petitioner do not support application of federal preemption to the facts of this case.

(iv) Rhode Island's treatment of the ultimate disposition of the refund in this case is consistent with Rhode Island Commission regulations, State decisional law and Massachusetts' treatment of the same refund to Blackstone's affiliated company.

Argument

WHILE THE POWER TO SET RATES FOR INTERSTATE SALES OF ELECTRIC ENERGY AT WHOLESALE IS VESTED EXCLUSIVELY IN THE FERC, THE STATES MAY REGULATE THE SALE OF SUCH ENERGY AT LOCAL RETAIL RATES TO ULTIMATE CUSTOMERS. IN THE INSTANT CASE, THE FERC HAD EXCLUSIVE JURISDICTION TO DIRECT THE AMOUNT OF THE REFUND TO BLACKSTONE, THE LOCAL RETAIL ELECTRIC DISTRIBUTING COMPANY, BUT THE STATE OF RHODE ISLAND PROPERLY REGULATED THE DISPOSITION OF THAT REFUND BY BLACKSTONE TO ITS RETAIL CUSTOMERS.

In *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 214, 11 L.Ed.2d 638, 646 (1964), this Court, quoting from *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 86 L.Ed. 371 (1942), made it clear that Congress had adopted a test "which defined state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate customers.' " 376 U.S. at 214 (quoting

314 U.S. 498, 504). As to the wholesale rate, the price at which Montaup sells power to Blackstone in interstate commerce, there can be no question that the FERC has exclusive jurisdiction. *See, Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. at 498; *Eastern Edison Co.* v. *Dept. of Public Utilities*, 388 Mass. 292, 446 N.E.2d 684 (1983). That interstate price would of course include any refunds to the wholesale purchaser ordered by the FERC. The States, and not the FERC, regulate the price of energy between Blackstone, the local distributing company, and its retail customers in intrastate commerce.

The refund at issue here is a refund or price adjustment affecting the retail price of electricity between Blackstone and its customers and therefore beyond the jurisdiction of the FERC. While the Attorney General may term the issue "novel" (Petitioner's brief, hereinafter "brief," p. 20), we respectfully suggest that the reason for that assertion is that no one to date has had the temerity to suggest a concept so alien to the United States Constitution, the Federal Power Act,[3] the Natural Gas Act,[4] the decisions of this Court and inferior federal courts and the highest courts of the States.

(i) *Factual background:*

There is no dispute as to the facts underlying the instant case. Blackstone's purchased power cost adjustment filing of August 19, 1987 included a credit of $4,789,441.04, representing refunds with interest approved by FERC as a result of settlements reached on all outstanding issues in Montaup's M-7 through M-11 filings with the FERC.

During the period November 5, 1981 through December 31, 1986, Montaup sold power to Blackstone at interim rates approved by the FERC, subject to refund. In turn, Blackstone

[3] 16 U.S.C. §§791(a) *et seq.*

[4] 15 U.S.C. §§717 *et seq.*

was allowed to reflect these costs in calculating the adjustment factor under its retail purchased power cost adjustment clause, R.I.P.U.C. tariff No. 709.[5]

Tariff No. 709 was superseded on January 1, 1987 by R.I.P.U.C. Tariff No. 745 (App. 32-33), a fully reconciling cost-of-service PPCA clause which allows an adjustment at least once every four months to match precisely what Blackstone has been billed for purchased power with the revenues it has received from its customers under the clause.

For the period covered by the refund, Blackstone offset the principal refund of $3,020,326.90 against its undercollection of M rates through 1986 and made allowance for an undercollection amount of $540,720.40 which the Commission had previously allowed Blackstone to recover (Exhibit BVE-6, Schedule H, p. 1 Revised; Supplemental Appendix 1). Blackstone's rates were not sufficient to pay Montaup's interim rates during the period prior to the final FERC decision on M rates. The Rhode Island Division of Public Utilities and Carriers[6] recognized this fact. Blackstone's customers never paid to Blackstone the principal amount of $1,866,340.37 which Blackstone paid to Montaup during the relevant period.

---

[5] There had been a progression of tariffs leading to R.I.P.U.C. Tariff No. 709, beginning with R.I.P.U.C. Tariff No. 568, but the pertinent language has remained unchanged. Recovery of purchased power costs under this tariff was accomplished by means of a kilowatt-hour charge based upon the operating results of twelve months immediately preceding a change in purchased power costs. It had no language allowing the reconciliation of costs and revenues except the following:

> "The amount of such adjustment [to reflect refunds from wholesale suppliers] by the Company shall not be geater than any applicable excess amount collected by the Company from its customers" (App. 35).

[6] Under Rhode Island statutory and case law the Division invariably assumes an adversary position against utilities on filings before the Commission. *R.I. Gen. Laws* §39-1-11 (1956), as amended; *Narragansett Electric Company* v. *Harsch*, 117 R.I. 395, 368 A.2d 1194 (1977).

Prior to determination that a refund was due, the Commission denied Blackstone's application to recover the amount of its undercollection during most of the period covered by the M rates. Blackstone had sought to recover $2,407,060.77 of the undercollection as a transition charge when it implemented R.I.P.U.C. Tariff No. 745, which replaced R.I.P.U.C. Tariff No. 709.

(ii) *The Rhode Island Supreme Court's reasoning:*

In denying the Attorney General's petition for reargument, the Rhode Island Supreme Court concluded (App. 8-9):

> "Rhode Island had recognized federal preemption far earlier in *Narragansett Electric Company* v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978). Neither the so-called 'Narragansett doctrine' nor the recent preemption decision by the United States Supreme Court in Mississippi Power & Light Co., supra, has the slightest impact upon the determination which the Public Utilities Commission of Rhode Island made upon the disposition of the subject refund. The FERC simply did not make any determination beyond that of requiring Montaup to refund a sum of money to Blackstone and its other wholesale customers. The disposition of those refunds was left as it must be to the individual state regulatory agency."

A brief analysis compels the conclusion that the Rhode Island Supreme Court correctly rejected the Attorney General's preemption argument. Furthermore, under Blackstone's intrastate tariffs and Rhode Island case law, the Rhode Island Supreme Court had no choice but to reject the Attorney General's argument that, upon refund by Montaup, Blackstone's ratepayers should not receive funds greater than the amounts they paid to Blackstone in the form of rates.[7]

---

[7] In *Roberts* v. *Narragansett Electric Company*, 470 A.2d 215 (R.I. 1984), the Court confronted a tariff virtually identical to Blackstone's Tariff No. 709 (App. 34-36); *See*, 470 A.2d 216-217. The Court concluded that to the

The Attorney General argues that the Rhode Island Supreme Court's decision conflicts with this Court's decisions in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. __. 101 L.Ed.2d 322 (1988) and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 90 L.Ed.2d 943 (1986). Neither case supports the Petitioner's argument. In the *Mississippi Power & Light Company* case, this Court held that the Mississippi Supreme Court could not permit a collateral attack on the reasonableness of a FERC-approved rate which permitted the power company to recover its costs of investment in a nuclear plant. The Court stated, 487 U.S. at __, 101 L.Ed.2d at 339, that "[w]hen FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate." The Rhode Island Supreme Court had already recognized the rationale of the *Mississippi Power & Light Co.* case in *Narragansett Electric Co.* v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978).

The Rhode Island Supreme Court recognized that the fundamental issue presented by the Mississippi case was the inability of the state court to question the prudence of a FERC decision permitting recovery by the retail entity of a power company expense. The Court stated (App. 8):

> "It was this determination by the Mississippi Supreme Court which the Supreme Court of the United States held in an opinion by Justice Stevens to be in violation of the

---

extent that Narragansett Electric did not collect sufficient funds from its customers to pay its power supplier, "equity and common sense" required that Narragansett's under-recoveries be offset against a refund received from its power supplier. To impose a refund obligation on Narragansett where the retail utility's customers had not paid sufficient funds to pay Narragansett's power bills "would border upon the unconscionable." *Roberts* v. *Narragansett Electric Co.*, supra, 470 A.2d at 217. The Attorney General continues to ignore this case.

> Federal Supremacy Clause, since Congress had given FERC plenary authority in this area and therefore the FERC decision could not be second-guessed by a state court or regulatory agency."

(iii) *Response to Petitioner's preemption argument:*

In *Nantahala Power & Light Company*, the FERC, in setting wholesale power rates, allocated certain low cost and high cost power to the Nantahala Power & Light Company ("Nantahala") and to its affiliate. Nantahala owned a hydroelectric power plant and sold most of its power output to the Tennessee Valley Authority. The wholesale power rates were based on the FERC allocation. In addition, Nantahala purchased certain high cost power from the Tennessee Valley authority to serve its wholesale and retail customers. The North Carolina Utilities Commission adopted a different allocation than FERC and, in rejecting federal preemption arguments, effectively held that Nantahala could not fully recover the amount of its power bills from its customers. 476 U.S. at 960-961. The North Carolina Supreme Court affirmed the regulatory agency's decision. This Court, in a unanimous decision, held that the State of North Carolina was preempted from changing the FERC-approved allocation and denying Nantahala the right to recover fully its power costs. The Court, per O'Connor, J., stated:

> "When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.* * *Here, Nantahala cannot fully recover its costs of purchasing at the FERC-approved rate if NCUC's order is allowed to stand." 476 U.S. 953 at 970, 90 L.Ed.2d 943, 956.[8]

[8] This Court in *Nantahala Power & Light Company* v. *Thornburg*, 476 U.S. at 965, cited with approval the Rhode Island Supreme Court's decision in *Narragansett Electric Co.* v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972, 56 L.Ed.2d 63 (1978). In the *Narragansett Elec-*

Neither the *Mississippi Power & Light Company* nor the *Nantahala Power Company* cases involved a refund. Unlike the present case, however, the States' action in both cases interfered with the amount of a FERC-approved wholesale power rate. In the instant case, the Rhode Island Supreme Court's decision on Blackstone's disposition of the Montaup refunds affects only the retail price of electricity between Blackstone and its customers and, as this Court stated in *Nantahala*, deals only with the State's undoubted jurisdiction over retail sales. 476 U.S. at 970. If the State's action is not at variance with a FERC-approved rate, as was the situation in *Narragansett Electric Company* v. *Burke*, 119 R.I. 559, 381 A.2d 1358, FERC's interest in the transaction between a wholesaler-as-seller and its retail customers in intrastate commerce terminates once the FERC-directed refund has been made. The case at bar involves the ultimate disposition of a refund, only a portion of which was collected from ratepayers.

The cases cited by the Attorney General (brief, p. 16 n.9) for the proposition that utilities cannot recover certain losses not only have nothing to do with federal preemption but do not support his proposed disposition of the refund in the case at bar. *Boston Edison Co.* v. *FERC*, 611 F.2d 8 (1st Cir. 1979), and *Public Service Co. of New Hampshire* v. *FERC*, 600 F2d 944 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 990 (1979) are representative of his citations. In each of these

---

tric Company case, the Commission, in an approach similar to the state's action in *Mississippi Light & Power Co.* v. *Mississippi ex rel. Moore*, 487 U.S. __, 101 L.Ed.2d 322, questioned the prudence of costs underlying the FERC-approved rates and prevented Narragansett from passing on to its retail customers a portion of those costs. The Rhode Island Supreme Court reversed the Commission, stating that the FERC-approved rate must be treated as a reasonable operating expense to Narragansett. 119 R.I. 559, 568-569. Of interest, the Court observed that the increased costs to Narragansett may or may not affect Narragansett's retail rate, depending upon whether Narragansett realized savings in other areas. *See*, *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. at 968.

cases, the Court of Appeals held that a utility, subject to FERC regulation, could not recover under a new, cost-of-service tariff a cost under-recovery incurred under a superseded, fixed-rate tariff. These cases are not refund cases and, unlike the instant case, involve principles of retroactive rate-making (see App. 3-4), which a state would nevertheless be free to accept or reject without regard to preemption.

(iv) *Response to Petitioner's offset argument:*

The Attorney General also argues that federal law is hostile to attempts by utilities to utilize refunds to set off losses (brief, pp. 17-20). Assuming, *arguendo*, that this federal hostility has some relevancy to actions by the States, the cases cited by the Attorney General do not support his shaky proposition. In *Belco Petroleum Corp.* v. *FERC*, 589 F.2d 680 (D.C. Cir. 1978) (brief, p. 18), an interstate seller of natural gas sought to offset a refund relative to excessive rates it had collected against income the utility never received during a five-month suspension period when the filed tariff was *not* in effect. The court was clearly correct in rejecting an attempt to make rates retroactive to cover a suspension period when the new rates were not in effect.

In *Gillring Oil Co.* v. *FERC*, 566 F.2d 1323 (5th Cir. 1978), *cert. denied*, 439 U.S. 823 (brief, p. 18), an independent gas producer sought to offset refunds, accumulated by excessive prices during an eight-year period, by the amount it charged below the allowable ceiling before and after the eight-year period. The court pointed out that the prices before and after the eight-year period were bargained for and were therefore fixed. Contract or tariff also appears to be the basis for the court's *per curiam* opinion in *Natural Gas Pipeline of America* v. *Federal Power Commission*, 134 F.2d 263, 265 (7th Cir. 1942) (brief, pp. 17-18). That case was recently distinguished in *Okaloosa Asphalt Enterprises* v. *Okaloosa County Gas*

District, 524 So.2d 1095 (Fla. App. 1 Dist. 1988), where the court observed that the FERC, as in the instant case, imposed no restrictions on the refund to be paid to the wholesale purchaser.

In *Interstate Natural Gas Ass'n of America* v. *FERC*, 756 F.2d 166 (D.C. Cir. 1985) (brief, p. 18), the court directed the FERC to implement refund procedures pursuant to an earlier decision that the FERC had improperly calculated natural gas wellhead prices. The FERC reversed an earlier order that producers making refunds could not offset moneys owed them by pipelines. The court, in directing the FERC to reinstate its earlier order, held that the FERC had not articulated reasons for its change of position and that the refund issue should not become entangled with disparate issues on appeal on another issue. 756 F.2d at 171-172.

United Gas Pipe Line Co. v. *FERC*, 657 F.2d 790 (5th Cir. 1981) (brief, p. 18), simply involved a FERC determination of how interest would be calculated when regulated companies were required to make refunds.

The FERC order at issue here directed Montaup to "refund all amounts collected in excess of the approved rates..." Opinion No. 267, *Montaup Electric Co.*, supra, 38 FERC (CCH) ¶61,252, at 61,866. Montaup had collected amounts from its customer, Blackstone. Contrary to the Attorney General's assertion (brief, p. 7), the FERC order did not address Blackstone's refund obligations to its customers. Blackstone's relationship with its customers affects the intrastate retail price between them and does not in this case affect in any way the wholesale interstate price between Montaup and Blackstone. Even if the FERC were authorized to order Blackstone to refund moneys to its retail customers, it would be hard-pressed to direct a "refund" of moneys never paid to Blackstone by its retail customers.[9]

[9] To refund is "to return (money) in restitution, repayment or balancing of accounts." *Webster's Third New International Dictionary* (G. & C. Merriam Co. 1961).

The Attorney General's reliance upon *Eastern Edison Co.* v. *Department of Public Utilities*, 388 Mass. 292, 446 N.E.2d 684 (1983) (brief, p. 19 n.10), presumably in support of his preemption argument, is puzzling.[10] As did *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. __, 101 L.Ed.2d 371, and *Narragansett Electric Company* v. *Burke*, 119 R.I. 559, 381 A.2d 1358, the *Eastern Edison* case involved a regulatory agency's attempt to prevent a retail utility from passing on part of the cost of a FERC-approved wholesale power rate. 388 Mass. 292, 446 N.E.2d 684. Relying on the Court's decision in *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 11 L.Ed.2d 638 (1964), the Massachusetts Supreme Judicial Court concluded "that the department's actions interfered with the FERC's exclusive jurisdiction to set rates for electricity transmitted and sold at wholesale in interstate commerce." 388 Mass. at 297, 446 N.E.2d at 687-688. The *Eastern Edison Company* case has nothing to do with the ultimate disposition of a FERC-directed refund by a retail utility in intrastate commerce.

(v) *Massachusetts treatment of the refund:*

When the same refund here at issue was made by Montaup to Eastern Edison Company, Blackstone's Massachusetts retail affiliate, the Massachusetts Department of Public Utilities had no hesitation in ordering a refund by Eastern Edison to its customers "to the extent previously collected from them . . ." *In re Eastern Edison Co.*, D.P.U. 87-29/87-53; April 3, 1987, p. 6; and subsequent approval in D.P.U. 87-186; September 28, 1987 (Supp. App. 2 *et seq.*).

[10] Eastern Edison's attorneys in the cited case are Boston counsel for Respondent in the instant case.

Conclusion

The Rhode Island Supreme Court correctly concluded that Petitioner's federal preemption argument "borders upon the frivolous." (App. 7). The Petitioner has not and cannot demonstrate why this Court should exercise its discretion and extraordinary power to issue a writ of certiorari. Rule 17, *Rules of the Supreme Court of the United States*. For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER J. MCGINN
TILLINGHAST, COLLINS & GRAHAM
One Old Stone Square
Providence, Rhode Island 02903
(401) 456-1200
Counsel of Record

ROBERT G. BLEAKNEY, JR.
SULLIVAN & WORCESTER
One Post Office Square
Boston, Massachusetts 02109
(617) 338-2903
Attorneys for Respondent
Blackstone Valley Electric Company

Supplemental Appendix 1

SCHEDULE H
1 OF 7
REVISED
8/28/87

CALCULATION OF NET REFUND

LINE 1	PRINCIPAL AMOUNT OF M-7, M-8, M-9 SETTLEMENT CREDIT.	$3,020,326.90
LINE 2	UNDERCOLLECTION OF M RATES THROUGH 1986.....	($2,407,060.77)
LINE 3	LESS ALLOWANCE FOR M-10 SETTLEMENT UNDERRECOVERY.....	$ 540,720.40
LINE 4	NET PRINCIPAL REFUND.....	$1,153,986.53
LINE 5	NET PRINCIPAL REFUND / PRINCIPAL REFUND = 1,153,986.53 / 3,020,326.90 =	0.38207
LINE 6	INTEREST REFUND.....	$1,769,114.14 0.38207
LINE 7	NET INTEREST REFUND.....	$ 675,925.44
LINE 8	AMOUNT PROPOSED TO BE REFUNDED... (LINE 4 + LINE 7)	$1,829,911.97
LINE 9	AMOUNT PROPOSED TO BE REFUNDED.... PER MONTH OVER 16 MONTH PERIOD (LINE 8 / 16)	$ 114,369.50
LINE 10	AMOUNT PROPOSED TO BE REFUNDED... IN SEPTEMBER AND OCTOBER 1987 (LINE 9 + 2)	$ 228,739.00

THE COMMONWEALTH OF MASSACHUSETTS

[SEAL] DEPARTMENT OF PUBLIC UTILITIES

April 3, 1987

D.P.U. 87-29/87-53

Investigation by the Department on the application of Eastern Edison Company for approval of an interim decrease in its Purchased Power Cost Adjustment factor, for three months, April 1, 1987 through June 30, 1987, to reflect settlement refunds received by Eastern Edison Company from its wholesale supplier as filed with the Federal Energy Regulatory Commission and a decrease in its Purchased Power Cost Adjustment, designated E-8.

APPEARANCES: DAVID FAZZONE, ESQ.
SULLIVAN & WORCESTER
One Post Office Square
Boston, Massachusetts 02109
FOR: EASTERN EDISON COMPANY
Petitioner

On February 9, 1987, Eastern Edison Company ("Company" or "EECo") petitioned the Department of Public Utilities ("Department") for a decrease in its purchased power cost adjustment ("PPCA"). The decrease is designated PPCA rate E-8 and is based on a decrease in EECo's demand costs under its wholesale tariff (M-11) from Montaup Electric Company ("Montaup"). The Federal Energy Regulatory Commission ("FERC") approved the change in Montaup's demand charge upon which the PPCA adjustment is based on January 1, 1987. EECo's filing was docketed as D.P.U. 86-29.

On March 4, 1987, the Company petitioned the Department for further changes in its PPCA rate which would reflect a refund to EECo from Montaup which was authorized and

approved by the FERC on January 30, 1987. The refund reflects the terms of a settlement agreement between Montaup, the Department of the Attorney General for the Commonwealth of Massachusetts, and the staff of FERC for costs during the period June 6, 1985, through December 31, 1986. The refund would reduce the proposed PPCA designated E-8 (M-11), and was filed pursuant to EECo's PPCA clause, M.D.P.U. No. 116. This request was docketed as D.P.U. 86-53.

EECo is a wholly-owned subsidiary of Eastern Utilities Associates ("EUA"), a utility holding company. EUA's other subsidiaries, affiliates of EECo, include Blackstone Valley Electric Company ("Blackstone") in Rhode Island, and EUA Service Corporation, which provides engineering, technical and other services for the EUA companies. Montaup is a wholly-owned subsidiary of EECo and supplies power to EECo, Blackstone, and certain municipal electric utilities. EECo purchases all of its power requirements at wholesale from Montaup pursuant to rates regulated by the FERC. Thus, EECo does not own or operate any units of its own to serve the approximately 154,629 customers in its service territory, which includes over 20 cities and towns in southeastern Massachusetts.

A public hearing to consider the Company's petitions was held on March 20, 1987, in the Department's offices. The Department directed the Company to give notice of the hearing by publication in the Fall River Herald News, the Quincy Patriot Ledger, the Brockton Enterprise, and the Boston Herald. The Attorney General of the Commonwealth ("Attorney General") was notified of this proceeding but did not seek to intervene.

At the hearing, the Company presented two witnesses, Dennis St. Pierre, director of rates for EUA Service Corporation, and Albert W. Newton, senior rate analyst for EUA. The Company offered five exhibits in support of the proposed changes

to its PPCA rate: Exhibit EE-1, the testimony and schedules of Mr. Newton; Exhibit EE-2, revised schedules of Exhibit EE-1; Exhibit EE-3, entitled "Eastern Edison Company Refund Plan"; Exhibit EE-4, revised schedules and pages of Exhibit EE-3, and Exhibit EE-5, revised page 90 of Exhibit EE-3.

The PPCA clause is designed to recover Montaup's demand-related charges to EECo. Under the terms of the Company's PPCA clause, M.D.P.U. No. 116, whenever there is a change in Montaup's demand rate, EECo is required to file for a revision to its PPCA factor with the Department.

Mr. Newton testified that the proposed decrease from the current PPCA (E-7) of $0.02215 per kilowatthour ("KWH") to $0.02167 resulted from a change in Montaup's demand charge to its wholesale customers from $20.12 to $20.06. The FERC approved the reduction in the demand charge by letter order on January 30, 1987. The company requests that the Department approve the required change in the PPCA to be effective immediately and without proration (Exh. EE-1, p. 2). The calculation of the adjustment of -$0.00049 is shown on Table 1 attached to this Order. This factor differs slightly from the Company's proposed adjustment of -$0.00048 because of the Department's policy to truncate the final significant digit of the factor.

Mr. St. Pierre testified that EECo proposes to refund $3,339,295.25 to retail customers through a three-month reduction of -$0.00625 to the proposed E-8 PPCA factor (Exh. EE-4, p. 96). The company's witness indicated that the proposed PPCA refund is composed of three parts: (a) $487,647.23, representing the M-10 and M-11 settlement refund and interest accrued thereon; (b) a $1,055,468.19 purchased capacity adjustment clause ("PCAC") reconciliation refund and interest received from Montaup (Tr. 16-17); and (c) $1,746,293.71, representing a reconciliation of EECo's PPCA expenses and revenues for the period March 1986 through December 1987.

The portion of the refund related to the settlement of rates M-10 and M-11 applies to costs collected by Montaup from EECo during the period June 6, 1985, through December 31, 1986.[1] Also approved by the FERC is a reconciliation of expenses and revenues under Montaup's PCAC.[2] The PCAC for Montaup became effective March 1, 1986, although it was approved retroactive to June 6, 1985, by the FERC. Under the terms of the PCAC, Montaup has prepared a reconciliation for the period March 1, 1986, through December 31, 1986, and has determined that EECo is entitled to a refund in the amount of $1,055,468.19 plus interest.

The third component of the refund is a reconciliation proposed by EECo of its expenses from Montaup and its revenues from the PPCA in effect from March 1, 1986, through December 31, 1986 (Exh. EE-5). Mr. St. Pierre testified that if the Company had not filed for the refund approved by the FERC, it would not have requested this reconciliation under the terms of its current PPCA tariff.

Under the terms of EECo's PPCA tariff, M.D.P.U. No. 116, the Company is required to file a plan to refund to its retail customers any amounts received from its wholesale supplier. EECo's refund plan (Exh. EE-3) proposes to return the $3,339,295.25 through a credit to its proposed E-8 factor during the months April, May and June 1987.

---

[1] The settlement allowed Montaup to recover from its wholesale customers 82 percent of its investment loss in Seabrook 2 over a period of 7½ years (Tr. 13). A partial settlement on the M-10 rate was approved by the FERC and was the subject of a refund which flowed through the PPCA in August 1986. EECo calculates an adjustment to its refund amount in this proceeding to account for reconciliation of its refund in August (Exh. EE-3, Sch. 6).

[2] The PCAC splits Montaup's traditional "M" rate into a base demand rate component and a purchased capacity component. In addition, the PCAC calls for an annual reconciliation of the revenues and expenses incurred by Montaup. While the first PCAC reconciliation occurred on February 28, 1986, this and all future PCAC reconciliations will be on a calendar year basis and should be reflected in the January billings from Montaup to EECo (Tr. 21-24).

FINDINGS

1. Given the information before the Department, the Department finds that the Company's purchased power cost adjustment factor E-7 (M-11) should be decreased by $0.00049/KWH to be effective for bills rendered beginning in the month of April 1987.

2. The Department finds that the company's refund plan requires further investigation. The Company should file revised schedules which calculate the appropriate refund amount including interest and its effect on the E-8 PPCA factor based on a proposed refund period of May, June and July 1987.

ORDER

Accordingly, after due notice, public hearing and consideration, it is

ORDERED: That Eastern Edison Company's purchased power cost adjustment factor No. E-7 (M-11) is hereby revised for all Eastern Edison Company filed rates, and is permitted to become effective with respect to bills rendered beginning in the month of April 1987, and shall be applied as a uniform charge to each KWH sold on the applicable rates which are subject to the Company's PPCA provisions; and it is

FURTHER ORDERED: That the rate provided for in Eastern Edison Company's purchased power cost adjustment factor No. E-8 shall be reduced promptly, following a reduction in Montaup Electric Company's proposed M-11 rate or such other Montaup Electric Company rate for primary service at wholesale as shall become effective in lieu thereof, as a result of proceedings before the Federal Energy Regulatory Commission; and it is

FURTHER ORDERED: That any refund paid or credited to Eastern Edison Company by Montaup Electric Company as a result of the aforesaid proceedings shall be promptly and

fully flowed through by Eastern Edison Company to its customers to the extent previously collected from them as the result of a price change provided for in purchased power cost adjustment factor No. E-8, in such manner as shall be approved by the Department.

A true copy
Attest;
/s/ MARY L. COTTRELL
MARY L. COTTRELL
Secretary

[SEAL]

By Order of the Department
/s/ ROBERT J. KEEGAN
Robert J. Keegan, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

Supp. App. 8

TABLE 1

EASTERN EDISON COMPANY PPCA D.P.U. 87-29

E-8 (M-11) Rates
Per KW Demand:
$20.05739

Month		Actual KW Demand	Billing KW Demand	E-B Base Demand Charges	KWH Sales to Final Customers
April	1986	342,100	346,960	$6,959,112	175,775,368
May	1986	364,500	364,500	$7,310,919	169,516,963
June	1986	377,400	377,400	$7,569,659	172,563,653
July	1986	403,300	403,300	$8,089,145	172,294,133
August	1986	394,900	394,900	$7,920,663	189,244,620
September	1986	361,400	361,400	$7,248,741	178,813,513
October	1986	368,200	368,200	$7,385,131	175,219,010
November	1986	386,500	386,500	$7,752,181	176,833,567
December	1986	402,900	402,900	$8,081,122	198,225,063
January	1987	401,300	401,300	$8,049,031	208,513,897
February	1987	395,600	395,600	$7,934,703	204,790,229
March	1987	397,900	397,900	$7,980,835	201,236,000
TOTALS		4,596,000	4,600,860	$92,281,243	2,223,026,016

	E-8 (M-11) Rates
PPCA PER KWH	$.041512
PPCA IN BASE RATES	$.019843
NEW PPCA	$ .02166
PREVIOUS PPCA E-7 (M-11)	$ .02215
PPCA INCREASE	$-.00049

EASTERN EDISON COMPANY

CALCULATION OF NEGATIVE SURCHARGE
DPU 87-186

LINE 1	ADJUSTED REFUND AMOUNT	$8,259,014.60
LINE 2	INTEREST (SCHEDULE 6)	273,630.05
LINE 3	PPCA UNDERCOLLECTION (SCHEDULE O)	-1,138,421.56
LINE 4	NET REFUND AMOUNT	$7,394,223.09
LINE 5	KWH SALES REFUND PERIOD OCTOBER 1987 - MARCH 1988	1,182,428,000
LINE 6	NEGATIVE SURCHARGE OCTOBER 1987 - MARCH 1988 / KWH	$ 0.00625

APPROVED

9/28/87

/s/ BERNICE K. MCINTYRE

/s/ ROBERT J. KEEGAN

COMMISSIONERS, D.P.U.